

SENATE RECORD VOTE ANALYSIS

104th Congress
1st Session

Vote No. 147

May 3, 1995, 5:51 p.m.
Page S-6076 Temp. Record

PRODUCT LIABILITY/Applies only in Federal Courts

SUBJECT: Product Liability Fairness Act . . . H.R. 956. Gorton motion to table the Thompson amendment No. 618 to the Gorton substitute amendment No. 596.

ACTION: MOTION TO TABLE AGREED TO, 58-41

SYNOPSIS: As passed by the House, H.R. 956, the Product Liability Fairness Act, will establish uniform Federal and State civil litigation standards for product liability cases and other civil cases, including medical malpractice actions.

The Gorton substitute amendment would apply only to Federal and State civil product liability cases. It would abolish the doctrine of joint liability for noneconomic damages, would create a consistent standard for the award of punitive damages, and would limit punitive damage awards.

The Thompson amendment would limit the applicability of the product liability provisions of this Act to only those legal actions brought under Federal tort law or resolved in Federal court under its "diversity of citizenship" jurisdiction. ("Diversity of citizenship," in tort law, refers to cases that involve parties from different States. If a defendant is sued by a plaintiff in a State court of another State, the defendant has the right to have that case transferred to a Federal court. However, in a suit, every plaintiff must be diverse to every defendant. For example, in a suit with multiple defendants, if any defendant and plaintiff are from the same State then there is no diversity (*Strawbridge v. Curtiss* (U.S. 1806)); this case dealt with joint interests, but later cases have extended the rule to several interests). The plaintiff could also initially file the case in Federal court. The Federal court would decide the case using the State tort law of the State in which the injury occurred (*Erie Railroad Company v. Tompkins*, 1938).)

Debate was limited by unanimous consent. Following debate, Senator Gorton moved to table the Thompson amendment. Generally, those favoring the motion to table opposed the amendment; those opposing the motion to table favored the amendment.

Those favoring the motion to table contended:

We are sympathetic to States' rights arguments, but we reject the claim that the Thompson amendment would protect those rights.

(See other side)

YEAS (58)			NAYS (41)			NOT VOTING (1)	
Republicans (45 or 83%)		Democrats (13 or 29%)	Republicans (9 or 17%)		Democrats (32 or 71%)	Republicans (0)	Democrats (1)
Abraham	Hatfield	Conrad	Cochran	Akaka	Hollings		Pell- ²
Ashcroft	Helms	Dodd	Cohen	Baucus	Inouye		
Bennett	Hutchison	Dorgan	D'Amato	Biden	Johnston		
Bond	Inhofe	Exon	Packwood	Bingaman	Kennedy		
Brown	Jeffords	Feinstein	Roth	Boxer	Kerrey		
Burns	Kassebaum	Glenn	Shelby	Bradley	Kerry		
Campbell	Kempthorne	Kohl	Simpson	Breaux	Lautenberg		
Chafee	Kyl	Lieberman	Specter	Bryan	Leahy		
Coats	Lott	Mikulski	Thompson	Bumpers	Levin		
Coverdell	Lugar	Nunn		Byrd	Moseley-Braun		
Craig	Mack	Pryor		Daschle	Moynihan		
DeWine	McCain	Robb		Feingold	Murray		
Dole	McConnell	Rockefeller		Ford	Reid		
Domenici	Murkowski			Graham	Sarbanes		
Faircloth	Nickles			Harkin	Simon		
Frist	Pressler			Heflin	Wellstone		
Gorton	Santorum						
Gramm	Smith						
Grams	Snowe						
Grassley	Stevens						
Gregg	Thomas						
Hatch	Thurmond						
	Warner						

EXPLANATION OF ABSENCE:

- 1—Official Business
- 2—Necessarily Absent
- 3—Illness
- 4—Other

SYMBOLS:

- AY—Announced Yea
- AN—Announced Nay
- PY—Paired Yea
- PN—Paired Nay

While it is true that jurisdiction over product liability tort law has been exercised almost exclusively by the States for the past 200 years, it is also true that the proliferation of suits and the size of awards in many States has reached the point that States' exercise of that jurisdiction affects interstate commerce. As a result, the suits in one State undermine the businesses in other States, violating their rights. Accordingly, it is appropriate for Congress to assert its authority under the commerce clause.

Proponents of the Thompson amendment have not challenged applying the provisions of this bill to cases which involve interstate commerce, but they have objected to applying it to cases which are purely intrastate in nature. In an attempt to carve a distinction between these types of cases, they have proposed that this bill should apply only to cases heard in Federal courts. This distinction is unartful. Though 70 percent of goods move in interstate commerce, only 5 percent of tort cases are filed in Federal courts, according to the Department of Justice. Therefore, the vast majority of cases involving interstate commerce are decided in State courts. From the outset, then, the Thompson amendment would reduce the coverage of this bill to only 5 percent of all cases. This number we believe would prove to be a high estimate in practice, because of the way that "diversity of jurisdiction" is decided. Though the definition of this term is complex, it essentially defines those cases which may be removed from State to Federal courts to decide. When so moved (generally for the greater professionalism of Federal courts or to guard against local prejudice), the case is decided by the Federal court using the applicable State's tort laws. The most salient fact in this instance, though, is not the definition of diversity, but that there are ways around it that any competent lawyer can exploit. In other words, it is an easy matter to make it impossible for a defendant to move a State case to Federal court. Consequently, considering that the reason this bill is necessary is that many States' laws are wildly tilted in favor of plaintiffs, we believe that agreeing to this amendment would cause the percentage of cases decided in Federal courts to drop drastically from the current 5 percent.

Our second objection to the Thompson amendment is on principle. The Thompson amendment runs counter to the *Erie Railroad Company v. Tompkins*. In that decision, the Supreme Court ruled that a State tort case that is removed to a Federal court must be decided under the applicable State law. The reasoning behind that decision was to prevent lawyers from gaming the system by searching for the best place to sue. The Thompson amendment, though, would entice lawyers to engage in that practice by weighing the Federal laws in this bill against the applicable State laws when they decide where they are going to file suit.

In summary, the Thompson amendment would fail in its attempt to make a distinction between Federal and State cases, and in the process it would make this bill apply to only a tiny fraction of product liability cases. Additionally, it would overturn the long-standing principle that lawyers should not be able to gain a legal advantage by shopping for the most favorable laws. Though we sympathize with the intent of this amendment's supporters, we must urge our colleagues to join us in tabling it.

Those opposing the motion to table contended:

Most Senators seem to be desirous of passing some tort reform measure in this session of Congress. At the same time, many Senators who support passing a bill are somewhat anxious, because they do not fully appreciate or understand the effect of the provisions which the Senate seems likely soon to enact. The rhetoric from both sides, which has been a bit overblown, has not helped settle the debate. On the one side, we have Senators accusing defenders of the current system as being at the beck-and-call of campaign-contributing trial lawyers; on the other side, we hear that supporters of reform are working to fatten the profits of greedy businessmen. Rather than concentrating on motives, we will concentrate on facts and reasoned analysis.

The key facts, as we see them, are as follows: States have been primarily responsible for product liability laws for over 200 years; those laws have been developed by trial and error over those 200 years; this bill for the first time would propose Federal standards that would override many of those laws; States are free to enact any reforms they deem necessary, and many States have recently been enacting limits such as those limits in this bill; the constitutional justification for the Federal Government intruding into this area is found in its right to regulate commerce; 70 percent of all manufactured goods in this country travel in interstate commerce; and Federal courts already try approximately 45 percent of all product liability cases. On all of these facts except the last one our colleagues are in agreement with us. Our data for the number of Federal product liability cases filed last year, 22,000, is from the Administrative Office of the U.S. Courts.

Based on these facts we have proposed the Thompson amendment. This amendment would limit the application of this bill to Federal civil filings. In order to try a case in Federal court, "diversity" would still have to be established, meaning that it would have to be established that parties to a suit were from separate States. Our colleagues have correctly noted that not all cases that can be removed to Federal court are currently so removed, and they have suggested that even less would be removed if the Thompson amendment were to pass. For us, though, the more important point is that cases that are purely intrastate in nature are never removed under current law, and they would not be under the Thompson amendment. The Thompson amendment would not apply Federal laws to purely State cases. This bill as drafted, though, will.

We think the Thompson amendment approach is preferable to the bill's approach because the nature of the proposed changes are so sweeping that we really do not know how the bill will work in practice. Under the Thompson amendment, Federal filings could be used as a pilot program to test the bill without overriding States' rights. Whether 45 percent or 1 percent of product liability filings ended up in Federal court it would still be possible to evaluate the efficacy of this bill's provisions. This cautious approach is appropriate, so we urge all Senators to join us in opposing the motion to table the Thompson amendment.

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